A loan upon mortgage in its nature differs little from any other loan upon collateral; the mortgagee having and keeping as his security for the loan the personal responsibility of the borrower, and the value of the real estate collateral, which he has thought proper to accept. The way in which this security may be increased under the New York rule, at every transfer of the encumbered premises, by the personal responsibility of the purchaser, seems unreasonable: and to allow him without resorting to the premises, a right of action for the whole debt against any one in the line of title, independent of the agreements such person may have with his grantor, seems quite inconsistent with ordinary legal principles. The more the subject is investigated, the more will the rule commend itself, that the promise of the grantee is directly for the benefit of his grantor, is merely to indemnify him from the debt, and gives the mortgagee no rights whatever at law, and only in equity an opportunity, after a sale of the premises, to avail himself of this duty so long as it is owed to the mortgagor, and no longer. H. G. W.

RECENT ENGLISH DECISIONS.

High Court of Justice; Queen's Bench Division.

EASTLAND v. BURCHELL.

The authority of a wife to pledge the credit of her husband, is not an inherent but a delegated authority. If she binds him it can only be as his agent.

Where a wife leaves her husband without cause she carries no implied authority to bind him even for necessaries; but when she is driven away by his fault, he is bound to maintain her elsewhere, and she becomes of necessity his agent to supply her wants upon his credit. In such case only is the question of the adequacy of an allowance or the suitableness of the goods furnished as necessaries, open to the jury.

Where, however, husband and wife separate by mutual consent, the terms on which the separation is made are binding on them so long as it lasts; and if one of the terms fixes the amount of the wife's income, she has no authority to pledge her husband's credit for necessaries in the event of such income proving insufficient.

THIS was an appeal from the Tunbridge County Court on a case stated for the opinion of the court.

The action was brought by the plaintiff, a butcher, against the defendants, who were husband and wife, for 38*l.* for meat supplied to the wife, who at the time was living separate from her husband.

The County Court judge gave judgment in favor of the plaintiff against the husband for the whole amount.

The husband appealed from this judgment, and on the appeal raised a question as to the rejection of evidence at the trial. The facts relating to this latter point will be found in the judgment.

Watkin Williams, Q.C., for the appellant.—A wife has no authority to pledge her husband's credit when separated from him, such separation being by mutual consent, and arrangements as to the income of the wife suitable to the position of the parties having been made: *Jolly* v. *Ress*, 15 C. B. N. S. 628. It is for the plaintiff to show that agency existed between the husband and wife. As to the question of evidence, it is clear from *Cobbett* v. *Hudson*, 1 E. & B. 11, that a man may be witness and advocate in the same cause: see note to *Manby* v. *Scott*, 2 Smith's Leading Cases 429.

Kingsford, for the respondent.—As to the second point, the judge was right in refusing the evidence of the advocate; it could only be hearsay. As to the principal question, when parties separate by consent, the question of sufficiency of allowance is for the jury. If it be not paid or inadequate, the husband is responsible for necessaries supplied to the wife. This principle runs through all the decided cases: see Addison on Contracts, 7th ed. 135; also *Hodgkinson* v. *Fletcher*, 4 Camp. 70; *Hunt* v. *De Blaquiere*, 5 Bing. 550; *Nurse* v. *Craig*, 2 B. & P. N. R. 148; *Johnston* v. *Sumner*, 3 H. & N. 261; *Biffin* v. *Bignell*, 7 Id. 877.

The judgment of the court was delivered by

LUSH, J.—The questions arising in this appeal are, first, whether the appellant is liable for butcher's meat supplied to his wife between the 13th of March and the 3d of October 1877, under the circumstances stated in the case; and, secondly, whether the County Court judge was right in excluding the evidence of his solicitor, who tendered himself to prove from his personal knowledge what the exact income of the appellant was, the ground of rejection being that the solicitor was acting as advocate for him in the cause, and that he could only give hearsay evidence.

The appellant and his wife were married in 1850. On the 6th of January 1876, they separated by mutual consent, the appellant taking charge of the four elder children, the three younger ones remaining with his wife. By their marriage settlement all the property then belonging to the wife, together with the property which would come to her on the death of her mother, was settled to her separate use. A deed of separation was executed by which she

was to take and enjoy all articles of personal ornament and dress, and all property and income to which she then was or should thereafter become possessed or entitled, and the savings of all income. The appellant covenanted to pay to the trustee 5*l.* per quarter so long as the three children, or any of them, should be under the age of twenty-one years and continue to reside with her; the wife covenanted that she would maintain and educate the children out of her separate income and the 5*l.* per quarter, and not apply to the appellant for any further pecuniary assistance; and the trustee covenanted to indemnify him from all debts and liabilities thereafter to be contracted by the wife.

The parties continued to live separate under this arrangement, and the appellant had paid the 5*l.* per quarter up to a period sub sequent to the accruing of the debt in question. The respondent had never known the appellant, and had only dealt with the wife subsequently to the deed of separation. He supplied the goods, supposing her to be a married woman, but without making any inquiries in the matter.

The only evidence on which the learned judge acted was that of the wife (it being admitted that the goods had been supplied), and she stated that she had been ever since the separation in receipt of her separate income, which brought in 297*l.* 15*s.* 2*d.* per annum, and the 20*l.* a year paid by the appellant, and that she found such income insufficient to enable her to maintain herself and such of her children as resided with her, and to educate them. The case states that she also gave evidence as to the position and income of the defendant prior to her separation, but does not state what that position and income were.

The learned judge decided upon this evidence that the income of the wife was insufficient for the maintenance and education of herself and the children under her care, and thereupon held, as a matter of law, that she had authority to pledge her husband's credit, and did pledge it to the respondent in respect of the meat supplied to her. We are of opinion that this ruling is erroneous. The authority of a wife to pledge the credit of her husband is a delegated, not an inherent authority. If she binds him, she binds him only as his agent. This is a well-established doctrine. If she leaves him without cause and without his consent, she carries no implied authority with her to maintain herself at his expense. But if he wrongfully compels her to leave his house, he is bound

to maintain her elsewhere, and if he makes no adequate provision for this purpose, she becomes an agent of necessity to supply her wants upon his credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's means, the sufficiency of any allowance which he makes under these circumstances is necessarily a question for the jury. Where, however, the parties separate by mutual consent they may make their own terms, and so long as they continue the separation these terms are binding on both. Where the terms are, as in this case, that the wife shall receive a specified income for her maintenance, and shall not apply to the husband for anything more, how can any authority to claim more be implied? It is excluded by the express terms of the arrangement. It is obviously immaterial whether the income is derived from the wife's separate property, or from the allowance of the husband, or partly from the one source and partly from the other. It is enough that she has a provision which she agrees to accept as sufficient. She cannot avail herself of her husband's consent to the separation, which alone justifies her in living apart from him, and repudiate the conditions upon which that consent was given. And it seems superfluous to add that no third person can claim to disturb the arrangement made between the husband and the wife, and to say that he will, by supplying goods to the wife on credit, compel the husband to pay more than the wife could have claimed, that is, the stipulated allowance. He can derive no authority from the wife which she is incompetent to give. We are, therefore, of opinion that any inquiry into the husband's means was irrelevant, and for that reason we abstain from saying more upon the second question than that, if evidence upon that point had been relevant, we see no reason why the evidence offered should be rejected.

We do not think it necessary to go through the various cases cited. They are no guides to us, except so far as they exhibit the principles on which the authority of a wife to pledge the credit of her husband rests. Upon that point they are conclusive to show that the capacity of a wife to contract debts upon the credit of her husband is derived from an authority either expressly or impliedly given by him. We need only refer to the two more recent cases of *Johnston* v. *Sumner* and *Biffin* v. *Bignell.*

We are not concerned to inquire whether in this or that particular case this principle has been rightly applied. We have only to

deal with the facts of this case, and applying the principle to them, we hold that the appellant is not liable for the debt contracted with the respondent.

Being satisfied that we have all the materials before us necessary for the determination of the question, it would be a useless expense to the parties to send the case back for a new trial. We, therefore, act upon the wholesome provisions of the Judicature Act, 1875, ord. 40, r. 10, and direct that the judgment for the plaintiff below be set aside, and judgment be entered for the appellant.

It may not be easy to reconcile all the decisions upon the subject of a husband's liability for his wife's contracts. In some of them the true ground of her authority—that of agency—may not have been kept distinctly in view. Indeed the prevailing custom among legal authors on contracts to treat the subject under the head of "Married Women" rather than under "Agency," where it more properly belongs, may have tended to mislead the reader as to the true source of her authority. But recognising now the doctrine in its fullest extent that a wife has not ordinarily, as wife, any original and inherent authority to charge her husband by her contracts—a power to endure so long as the relation endures—but that she can bind him only as her agent, express or implied—implied in fact, or implied in law—let us, for convenience sake, consider the subject in four classes of cases:

1. During cohabitation; 2. When she has left him through his fault; 3. When they separate by mutual consent; 4. When she leaves without just cause.

1. During cohabition. And here we should exclude all those cases where an implied agency *in fact* is created, as by having paid former bills without objection, or when the husband sees or knows of the delivery and consumption of the goods without any disapprobation, or when in any way he ratifies and confirms his wife's purchases—for these circumstances might create a tacit agency, whether the purchases were made by a wife, a son, or a servant. They, therefore, shed no true light upon the question we are now considering, viz., the extent of her implied agency in law. And many of the apparently conflicting cases on this subject may be reconciled on the ground that there was evidence of some tacit agency in fact.

It may therefore be assumed, that during cohabitation a wife has ordinarily a *prima facie* agency to purchase on her husband's credit, necessary supplies for herself and the family. This is based largely upon the fact that it is customary to intrust a wife with the management of the household affairs, and to that extent, tradesmen have a right *prima facie* to consider her authorized. The authorities on this point are so uniform as to render their citation unnecessary. And see *Jewsbury* v. *Newbold*, 26 L. J. Ex. 247 (1857), not elsewhere reported; *Jolly* v. *Rees*, 15 C. B. (N. S.) 628.

But this agency is limited to articles that are reasonably necessary for her or the family, and does not extend to business contracts, nor to purchases of extravagant articles for herself or children, or gifts for her friends. See *Lane* v. *Ironmonger*, 13 M. & W. 367; *Seaton* v. *Benedict*, 5 Bing. 28; *Montague* v. *Benedict*, 3 B. & C. 631; *Philipson* v. *Hayter*, Law Rep. 6 C. P. 38; *St. John's Parish* v. *Bronson*, 40 Conn. 75; *Sutter* v. *Mustin*, 50 Ga. 242.

And the agency to purchase necessaries even, is only *prima facie*, and may be disproved by the husband, by show-

ing that he had abundantly supplied the house with all things necessary and suitable; or that he had furnished his wife with ample ready money for the purpose, and requested her not to purchase on credit; or had provided suitable places where all things necessary could be had, and forbidden her to purchase elsewhere. The husband is still, in view of the law, the head of the house; and has a right to control the affairs of his own household. He has a right to say when and how his house shall be supplied, though of course he cannot repudiate his obligation altogether. But so long as he does his duty in this particular, there is no duty to be done for him by another, and therefore there is no one authorized by law to do it. The modern cases of *Woodward* v. *Barnes*, 43 Vt. 330; *Reid* v. *Teakle*, 13 C. B. 627; *Reneaux* v. *Teakle*, Ex. 680; *Jolly* v. *Rees*, 15 C. B. (N. S.) 628; *Holt* v. *Brien*, 4 B. & A. 252; *Cromwell* v. *Benjamin*, 41 Barb. 560; *Heriott* v. *Bagioli*, 9 Bosw. 578; *Richardson* v. *Dubois*, Law Rep. 5 C. P. 51; *Keller* v. *Phillips*, 39 N. Y. 351; 40 Barb. 390; *Burr* v. *Armstrong*, 56 Mo. 577; *Harrison* v. *Grady*, 12 Jur. (N. S.) 140; 14 Weekly Rep. 139; *Shoolbred* v. *Baker*, 16 Law T. Rep. (N. S.) 359; *Ryan* v. *Nolan*, Irish R. 3 C. L. 319, fully support these views, though doubtless there may be some authority the other way. *Ruddock* v. *Marsh*, 1 H. & N. 601, in which the husband was held liable for necessaries supplied and consumed in his absence, although he had left sufficient money with his wife for that purpose, is apparently contrary to all sound rule on this subject.

2. Where she leaves him through his fault. Here she carries her implied agency with her, and has the same power to supply her own wants on his credit, as before. *Hancock* v. *Merrick*, 10 Cush. 41; *Mayhew* v. *Thayer*, 8 Gray 172; *Reynolds* v. *Sweetser*, 15 Id. 78; *Emery* v. *Emery*, 1 Y. & J. 501; *Hultz* v. *Gibbs*, 66 Penn. St. 360; *Houleston* v. *Smyth*, 3 Bing. 127; *Brown* v. *Ackroyd*, 5 El. & Bl. 819; *Harrison* v. *Grady*, *supra*; *Forristall* v. *Lawson*, 34 Law T. Rep. 903 (1876). But if he still furnishes her abundant means to do so, without pledging his credit, she has no right to use the money otherwise, and purchase on his name. And if the husband authorizes her to buy at certain places, where she can be suitably supplied, and forbids her to do so at some particular place, he has a right to do so, and is not bound by her contracts at that place, in violation of his express orders, when there was no reasonable need of her so contracting; certainly after notice of the facts to the party seeking to charge him. Her whims are not the criterion of her power, but her needs only, and he has a right still to dictate who his creditors shall be, provided always he does not unreasonably limit her in her range of choice. See *Mott* v. *Comstock*, 8 Wend. 544; *Kemball* v. *Keyes*, 11 Id. 33; *Mizen* v. *Pick*, 3 M. & W. 481; where the husband was living apart from his wife in adultery, but allowed and paid her a sufficient sum for her maintenance, he was held not liable for her board and lodgings, though the plaintiff had no notice of the allowance. But if the allowance he makes her is inadequate, or if he does not pay it promptly, she still retains her agency to purchase on his credit. *Nurse* v. *Craig*, 5 B. & P. 148; *Baker* v. *Sampson*, 14 C. B. (N. S.) 382; *Collier* v. *Brown*, 3 F. & F. 67.

3. When they separate by mutual consent. And here the case of *Eastland* v. *Burchell*, no doubt, lays down the modern English rule. If she has by articles of separation deliberately agreed to accept a stated sum in full for her support, and stipulated not to contract on her husband's name, she cannot do so, even though the sum paid proves inadequate. Her agency is terminated. She has by her own act abrogated it.

And though the tradesman who supplies her is ignorant of the facts, yet he trusts her at his peril. She cannot give another rights she does not herself possess. See *Mallalien* v. *Lyon*, 1 F. & F. 431.

In *Johnston* v. *Sumner*, 3 H. & N. 261 (1858), the defendant and his wife had separated by mutual consent, and with the agreement that she should have 200*l.* a year, for her own use, which she had been receiving during her marriage under a covenant from her mother to that effect. The plaintiff had supplied her, on her own order, with dresses and articles of millinery to the amount of 160*l.*, without knowing she was married, and without making any inquiry about it, but having afterwards ascertained the fact, he brought an action against the husband for it. Upon these facts it was held there was no evidence to warrant a jury in finding for the plaintiff, and he was nonsuited, which was confirmed by the Court of Exchequer, upon the ground that the question was one of the wife's authority, that the creditor must make that out; that to do so, he must show, if they were living separate and apart, she was doing so under circumstances giving her an authority to pledge his credit, and if she had agreed to accept an allowance, which was paid, it was the plaintiff's duty to show such allowance inadequate, and that not being shown, there was no evidence to charge the husband.

In *Biffin* v. *Bignell*, 7 H. & N. 877 (1862), the husband allowed and paid his wife, as per agreement between them, twelve shillings a week, and she boarded with the plaintiff, who claimed 36*l.* for three months' board and lodging. BRAMWELL, J., told the jury that if the defendant's wife was living apart from him under an agreement by which she was to receive a weekly allowance, which was paid, she could have no authority to pledge his credit, and the defendant would be entitled to their verdict. And this ruling was affirmed, BRAMWELL repeating that even if the provision was inadequate, the wife would have no such authority, so long as she lived apart under such a conditional assent on the part of the husband, conditional upon the fact that she would accept the provisions in full of all claim for support.

It is not clear the American rule goes quite so far. If the amount so paid is found adequate to her wants by the jury, it is clear she has no authority to go beyond it and purchase on credit. One of the earliest and best considered cases in America on this point is *Cany* v. *Patton*, 2 Ashm. 140, which agree with the English rule laid down in *Hodgkinson* v. *Fletcher*, 4 Camp. 70; *Holder* v. *Cope*, 2 C. & K. 437; *Reeve* v. *Conyngham*, Id. 444; *Emmett* v. *Norton*, 8 C. & P. 506; where the adequacy of the allowance seems to have been considered material. And see *Fredd* v. *Eves*, 4 Harr. 385.

So it was held in *Pidgin* v. *Cram*, 8 N. H. 350, that where they separate by mutual consent, and the husband makes a contract with a suitable person, to support his wife in a suitable manner, she cannot leave that place without any just cause and pledge her husband's credit elsewhere for her support. And see *Stevens* v. *Story*, 43 Vermont 327. Though some hold that even in such case, if the wife has sufficient means of *her own*, she cannot purchase on her husband's credit; for if she chooses to live separate and apart, without his fault, and by mutual consent, she can only charge him in case of actual necessity; and if able, she must pay her own bills. See *Litson* v. *Brown*, 26 Ind. 489; *Dixon* v. *Harrell*, 8 C. & P. 717; *Liddlow* v. *Wilmot*, 2 Stark. 86; *Clifford* v. *Layton*, Mood. & Mal. 102; 3 C. & P. 15.

Of course if he does not promptly pay the stipulated allowance, she still retains her agency, as before. *Beale* v.

Arabin, 36 L. T. Rep. (N. S.) 249; not elsewhere reported, but a valuable case on the point. *Baker* v. *Barney*, 8 Johns. 57.

4. Where she leaves by her own fault. And here all agree she leaves her agency behind her, especially when she has committed adultery. No matter what her necessities may be, no matter how innocent or ignorant the person who supplies her may be of the circumstances of the separation, she has no power to bind her husband for even the necessaries of life. *McCutchen* v. *McGahay*, 11 Johns. 281; *Cooper* v. *Lloyd*, 6 C. B. (N. S.) 519; *Henderson* v. *Stringer*, 2 Dana 292; *Hunter* v. *Boucher*, 3 Pick. 289; *Oinson* v. *Heritage*, 45 Ind. 73; *Bevier* v. *Galloway*, 71 Ill 517. And this shows that her power does not spring solely and absolutely from her relation as wife—for she is such still—but from some other principle, which ought to be kept steadily in view in all these four classes of cases.

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

Supreme Court of Errors of Connecticut.

THE DELAWARE AND HUDSON CANAL CO. *v.* SAMUEL BONNELL ET AL.

A creditor who levies on an equity of redemption, and has the amount of the encumbrance allowed in his favor in the appraisal of the interest set off to him, cannot set up the invalidity of the encumbrance.

Whiteacre and Blackacre were mortgaged to A., and afterwards Blackacre to B., and still later Blackacre to C. B. foreclosed the mortgagor and C. upon his mortgage of Blackacre, and then redeemed both pieces by paying A.'s mortgage, taking a quit-claim from A. C. afterwards levied an execution against the mortgagor, upon the equity of redemption in Whiteacre, subject to the entire mortgage-debt to A., now held by B., and resting upon both pieces—the whole of that debt being allowed for in the appraisal of the equity levied on. Upon a petition brought by B. to foreclose the mortgagor and C. upon the mortgage of Whiteacre, originally made to A., it was held that C. was estopped from claiming that Blackacre should be charged with any portion of the mortgage-debt.

There was no merger of the mortgage interest acquired by B. in Whiteacre, because he had no superior estate in Whiteacre in which it could merge, and because, if he had, it was for his interest that it should not merge, and therefore presumably his intent that it should not.

BILL for a foreclosure, brought to the Superior Court in Fairfield county. Facts found by a committee, and decree of foreclosure passed by HOVEY, J. Motion in error by respondents. The case is fully stated in the opinion.

G. H. Watrous and *W. B. Stoddard*, for the plaintiffs in error, cited as to merger, *Lockwood* v. *Sturdevant*, 6 Conn. 390, and *Bassett* v. *Mason*, 18 Id. 136; and upon the point that a mort-